

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVEN GREGG VASSALLI

Claimant

VS.

CITY OF WICHITA

Respondent

Self-Insured

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Docket No. 262,962

ORDER

Respondent requested Appeals Board review of Administrative Law Judge John D. Clark's January 24, 2002, Nunc Pro Tunc Award. On July 12, 2002, the Appeals Board heard oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Gary K. Jones of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Edward D. Heath, Jr. of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award.

ISSUES

This is a claim for a back injury that claimant suffered while working for the respondent. As a result of the back injury, claimant had permanent work restrictions imposed on his work activities. Claimant was terminated effective June 22, 2001, because respondent could not accommodate those restrictions. Following the termination, the Administrative Law Judge (ALJ) found claimant made a good faith effort to find appropriate employment. But claimant had not been successful in finding employment at the time he last testified. The ALJ then found that claimant proved he suffered a 25 percent work task loss and averaged that loss with a 100 percent wage loss and awarded claimant a 62.5 percent work disability.

On appeal, respondent argues that claimant's work disability should be reduced to 58.5 percent. Respondent contends the ALJ erred when he eliminated eight work tasks claimant retained the ability to perform in a part-time business claimant had participated

in since March 1999. Respondent argues that those work tasks should be included in the work task analysis resulting in a 17 percent work task loss instead of the 25 percent loss found by the ALJ.

In contrast, claimant requests the Board to affirm the ALJ's 62.5 percent work disability award. Claimant contends that the ALJ was correct in eliminating the work tasks he performed in the automotive product sales business because the business was part-time and claimant proved he lost money in the business.

Claimant also argued that the Board should dismiss respondent's appeal because the original Award was entered on January 8, 2002, and respondent did not file its application for review until January 28, 2002, clearly outside the 10 day period to appeal a final order to the Board.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and the parties' arguments, the Board makes the following findings and conclusions:

The Board concludes that the ALJ's Award should be affirmed. The Board agrees with the ALJ's conclusion that claimant established that the part-time business of selling automotive products he had participated in since March 1999, had not earned a profit and in fact had lost money. Claimant retained the ability post-injury to perform all eight work tasks he had to perform in that business. But the Board finds, as did the ALJ, that a part-time business that has not made a profit does not constitute substantial gainful employment. Thus, those work tasks should be excluded from the list of work tasks claimant had performed in substantial gainful employment in the 15 years preceding his work related accident.²

As noted above, claimant also raised the issue of whether claimant timely appealed the ALJ's Award. The original Award was entered in this case on January 8, 2002. But because of a clerical error in the Award, which was pointed out by the parties, the ALJ corrected the clerical mistake and entered the Nunc Pro Tunc Award on January 24, 2002. The respondent on January 28, 2002, filed a timely appeal of the Nunc Pro Tunc Award. The Board finds, in this case, that the January 24, 2002, Nunc Pro Tunc Award was the final award entered in this matter and respondent's application for review filed January 28, 2002, was timely filed within the 10 day period to appeal.

¹ See K.S.A. 44-551(b)(1).

² See K.S.A. 44-510e(a).

Furthermore, the Board finds the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. It is not necessary to repeat those findings and conclusions in this Order. The Board, therefore, adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ John D. Clark's January 24, 2002, Nunc Pro Tunc Award, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of August 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary K. Jones, Attorney for Claimant
Edward D. Health, Jr., Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation